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中国电子签名的法律效力研究

**Research on Legality and Validity of the Electronic Signature in
the People's Republic of China**

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摘要

为推进电子商务，第十届全国人民代表大会常务委员会在 2004 年 8 月 28 日颁布了《中华人民共和国电子签名法》，并从 2005 年 4 月 1 日起开始实施。

基本上，在立法层面，法律承认具有法律效力的数据信息和电子签名。而且，它规定，除了法律或行政法规另有规定情况外，“任何一份法律文件不能仅因其系以数据信息形式出现或使用电子签名签署就否认它的法律效力。”电子签名法采用“功能等同法”，其做法绝不是“约束性的”。电子签名不是强制性的，不替代印章和手写签名。

总而言之，通过对电子签名法和电子认证服务管理办法的分析，能够得出积极的评价，并凸显了中国政府秉承“技术中立”理念发布的文本，尽管还存在一些不足，但已经相当成功了。

关键词： 中国；电子签名；法律效力；完善

ABSTRACT

To boost electronic business, on August 28, 2004 the Standing Committee of the 10th National People's Congress enacted the "Electronic Signature Law of the People's Republic of China" (E-signature Law). This new legislation has been effective since April 1, 2005.

Essentially, the law recognizes at a statutory level the legal validity of data messages and electronic signatures. Furthermore, it stipulates that, except for cases listed in an administrative law or regulation, "no document shall be denied legal effect on the sole ground that it is in the form of a data message or signed through the use of an electronic signature". The Electronic Signature law adopts a "functionally equivalent approach" and is absolutely not "binding", as electronic signatures are not obligatory and do not replace affixed seals or handwritten signatures.

Overall, the analysis of both the E-signature Law and the Management Measures for the Electronic Authentication Services (Certification Authority Regulations) was quite conclusive and highlighted the fact that the "technology-neutral" text issued by the Chinese government is, despite some weaknesses, quite strong.

KEY WORDS

Legality; Validity; Electronic signature; China; Improvements.

ABBREVIATIONS

AIC (Administration of Industry and Commerce)

AMECS (Administrative Measure on Electronic Certification Service)

CA (Certification Authority)

CAR (Certification Authority Regulations)

CFCA (China Financial Certification Authority)

CNNIC (China Internet Network Information Center)

ESL (Electronic Signature Law)

MII (Ministry of Information Industry)

MLEC (Model Law for Electronic Commerce)

PKI (Public Key Infrastructure)

PRC (People's Republic of China)

PSB (Public Security Bureau)

UNCITRAL (United Nations Commission on International Trade Law)

WTO (World Trade Organization)

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INTRODUCTION

Over the past three decades, China has transitioned to a market economy at an astonishing pace¹. With an estimated 800 million Internet users in 2015², China has become the world's largest online market³ and the infrastructure and the growing interest in the Internet represent a phenomenal potential market for e-business. Even nowadays, the People's Republic of China (PRC) still has one of the fastest growing economies in the world and the government remains on track to fulfill its goal of making China a global leader in innovation by 2020⁴.

In order to reach such an objective and attract foreign investment from individuals, industries and governments, the Chinese government deemed it necessary to institute a series of policies, regulations and laws.

Because the XIX century has witnessed the amazingly fast development of the Internet and all other "numeric communications", a certain number of questions quickly rose to the surface regarding "the authenticity" of such documents and their author's identity. Indeed, a signature must fulfill two tasks; it must (1) accurately identify its author, and (2) demonstrates the consent of the parties to the obligations that arise from this act.

The popularization of this "open to all" network matches the need to contract faster, in order to consume more quickly and efficiently. However, parties to those contracts need to do that

¹ Jane Winn & Song Yuping, Can China Promote Electronic Commerce Through Law reform? Some Preliminary case Study Evidence, 20 Colum. J. Asian L. 415, (2007).

² According to the China Internet Network Information Center (CNNIC), the government agency monitoring Internet use, there were nearly 564 millions users in Chian in December 2012. Avaliable at <http://www1.cnnic.cn/IDR/>, last accessed March 12, 2015.

³ BSA Global Cloud Computing Scorecard, Report on Country: China, last accessed March 7, 2015 (www.bsa.org/cloudscorecard).

⁴ Yang Lei, China Sets Goal for Developing Science, technology in 15 Years, Xinhua, Feb. 9, 2006 (referencing 国家中长期科学和技术发展规划纲要 (2006-2020) [Guidelines on National Medium and Long Term Planning for Science and Technology Development], St. Council, Xinhua, Feb. 9, 2006) available at http://www.gov.cn/english/2006-02/09/content_183774.htm (last accessed February 23, 2015).

while believing that their engagements are safe and secure. Indeed, in most societies, the Internet has switched from a simple informative tool to a major communication use to quickly share essential information.

However, although electronic data messages (or e-mails) have the advantage of being transmitted anywhere more quickly than any other handwritten materials, they did not enjoy the same level of legal recognition as a paper documents signed by hand (or with an affixed seal).

Contrary to what many people think, this “electronic world” is not a legal no man’s land⁵. Indeed in order to promote a greater use of electronic commerce among Chinese businesses and encourage the use of “computerized management information systems”⁶, the PRC enacted different legislations. Based on the model issued by the United Nations Commission on International Trade Law (UNCITRAL)⁷, those regulations include, amongst others; the 1999 Contract Law⁸ -which in theory removed impediments to the use of electronic commerce by Chinese businesses- as well as the 2004 Electronic Signature Law⁹ which promotes the use of a “specific type of technology for authentication”¹⁰.

With the same objective in mind, it should be noticed that in 2012 China introduced the first

⁵ E. A Caprioli, *Sécurité et confiance dans le commerce électronique : signature numérique et autorité de certification*, JCPG, N°14, 1^{er} avril 1998, I 123, p. 1, §2.

⁶ Jane Winn & Song Yuping, *supra* note 1

⁷ UNCITRAL Model Law on Electronic Signatures 2001, available in electronic format at <http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>. UNCITRAL developed the model law to assist legislators in trading nations to harmonize their national commercial laws and to eliminate barriers to international trade. The United Nations Commission on International Trade Law (UNCITRAL) (French Commission des Nations Unies pour le droit commercial international (CNUDCI)) was established by the United Nations General Assembly by its Resolution 2205 (XXI) of 17 December 1966 "to promote the progressive harmonization and unification of international trade law".

⁸ Ninth National People’s Congress (Second Session), CONTRACT LAW OF THE PEOPLE’S REPUBLIC OF CHINA (hereinafter “Contract Law”), Adopted 15 March 1999.

⁹ Order (No. 18) of the President of the People’s Republic of China, LAW OF THE PEOPLE’S REPUBLIC OF CHINA ON ELECTRONIC SIGNATURE (hereinafter “Electronic Signature Law,” or “ESL”), Adopted at the 11th Meeting of the Standing Committee of the Tenth National People’s Congress of the People’s Republic of China, Promulgated Aug. 28, 2004, Effective April 1, 2005.

¹⁰ Jane Winn & Song Yuping, *supra* note 1

elements of a national level privacy regulation that would help improve trust and confidence in the digital economy of China¹¹. Indeed, March 15, 2012 marks the effective date of new privacy regulations issued on December 29, 2011, by the Ministry of Industry and Information Technology of the People's Republic of China titled *Several Provisions on Regulation of the Order of Internet Information Service Market*. The new regulation defines the personal information protection requirements applicable to Internet Information Service Providers ("IISPs"). Following the same wave, on December 28, 2012, China's national legislature enacted a new law to further regulate the collection and use of online personal information and to require certain network service providers to implement real name registration for all users. The new law, entitled the Decision of the Standing Committee of the National People's Congress on Strengthening Online Information Protection (the "Online Information Decision"), requires "network service providers" and other "enterprises or public institutions" to clearly indicate the "use, method, and scope" of their collection of an individual's "personal electronic information," and not to collect or use this information without the individual's consent.

As said before, in order to provide a stable e-environment, the Chinese government introduced some legislation (see above) and formulated the electronic signature law to provide guidelines and protection for e-businesses and their customers¹².

While electronic contracts have been valid in China since the enactment of the *PRC, Contract Law*, their use has been undermined by the absence of a law governing electronic signatures.

Therefore, in an effort to standardize the practice of the certifications authorities¹³, and to clarify the legal validity of e-record or e-document, the "State Council's Information Office" first decided, in 2002, to enact the Electronic Signatures Ordinance of People's Republic of China, but as an administrative regulation. However, after taking into account the importance

¹¹ BSA Global Cloud Computing Scorecard, Report on Country: China, last accessed March 7, 2015 (www.bsa.org/cloudscorecard).

¹² Aashish Srivastava and S.Bruce Thomson, *E-Business Law in China: Strengths and Weaknesses*, 2007, *Electronic Markets* Vol.17 No 2.

¹³ Later referred to as "CA".

of e-documents and e-records in electronic commerce and the fast development of electronic commerce, the State Council's Legislative Affairs Office decided to enact an electronic signatures law instead of an ordinance¹⁴.

The draft Electronic Signatures Law was submitted to the State Council on 25 March 2004.

As a result, the *Electronic Signature Law of the People's Republic of China* ("E-Signature Law") was approved by the Standing Committee of the 10th National People's Congress on 28 August 2004, and became effective on 1 April 2005.

The electronic signature law (ESL) is part of the e-commerce legislation, which is itself a branch of commercial law; therefore the ESL belongs to the civil and commercial legislation of the Chinese legal system.

The adoption of the E-Signature Law -which grants electronic signatures the same legal effect as handwritten signatures and/or affixed seals in business transactions and aims to set up a secure market access system for online certification providers- was a catalyst for the development of e-commerce services in China¹⁵.

According to Stephen Blythe, there were three generations of e-signature laws that have appeared throughout the world since 1995. The first wave mandated the exclusive use of digital signatures, allowing no other form of e-signature. The second wave opposed this view and "took an open minded attitude toward the allowance of any type of e-signature"¹⁶. The third wave adopted a more moderate position as it recognized the existence and validity of many forms of e-signatures but granted a preferred status to the digital signature. China joined the third wave.

¹⁴ Minyan Wang and minju Wang, Introduction to the Electronic Signatures Law of People's republic of China, Digital evidence and electronic signature law review, (2006), available at www.deaeslr.org.

¹⁵ Jun wei, *Analysis of the New Electronic Signature Law*, Hongan & Hartson L.L.P., last accessed March 4, 2015, (http://www.hoganlovells.com/files/Publication/b029f540-be25-4fe7-98ef-690d5d45cf9f/Presentation/PublicationAttachment/644ea036-ecd0-4aae-993e-776163ce2711/1685_Electronic%20Signature%20Law.pdf)

¹⁶ Stephen Blythe, China's New Electronic Signature Law And Certification Authority Regulations, 7 Chis-Kent J. Intell. Prop 1. (2007).

CHAPTER I THE ELECTRONIC SIGNATURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA

What is a signature? According to C. Devys¹⁷, a signature is “any sign closely linked to a document¹⁸ that allows to accurately identify the author of the document, while transmitting with absolute certainty, his willingness to approve the content of the document”.

For hundred of years, official or personal stamps have been widely used in China as the typical way to sign legal documents. Indeed, traditional handwriting or stamp-based signature has three main functions that are; identifying the signer, indicating the signer's confirmation of content of the documents and establishing that the signer is responsible for the exactness and the integrity of the document¹⁹. To substitute the main functions of the conventional signatures or stamps, e-signatures are needed to represent a party's identity and fulfill a certain number of conditions when conducting online transactions.

Sub-Chapter 1 Before the Electronic Signature Law

Before the enactment of the Electronic Signature Law of the Peoples Republic of China, a certain number of local regulations already existed in some provinces and cities, but they were not coherent and compatible with one another. Indeed, at that time, the only legally recognized method to sign a document was to use a handwritten signature or a company seal.

Section 1 Legalization of Documents in China Before the ESL

After negotiating a good deal that is beneficial for both your company and your Chinese business partner you have come to the last stage of conducting your deal, the signing

¹⁷ C. Devis, Du sceau numérique à la signature numérique, Rapp. OJTI, nov. 1995, pub.in OJTI, ss. Dir. C. DHENIN, Vers une administration sans papier, Paris, La documentation française, 1996, P96.

¹⁸ An « act » in French.

¹⁹ Zhonghao Liu, E-Signature Use in China: Four case studies, International journal of Cyber Behavior, Psychology and Learning, 2 (4), 78-83, October-December 2012.

and legalization of the contract²⁰. If you want your contract to be binding (and therefore enforceable) you need to have your documents signed in the correct way and by the right person.

In the People's Republic of China, most companies use official seals called "chops" to enter in legally binding agreements. In China, company chops are the equivalent of a signature in Western Europe and remain the main means of legally authorizing documentation. There are many different types of chops; each with different powers and risks that are to be efficiently managed in order to stay in control. Those stamps (or seals) play a powerful role in everyday business; this is why every company's chop is obligated to be registered with the Public Security Bureau (PSB).

According to the author²¹ there are different types of chops for different purposes:

The Company chop is used to sign all legal documents and is therefore the most important and most powerful chop. The company chop is usually round in shape and the registered name of the company is engraved at the bottom of the stamp. Once the company is successfully registered with the Administration of Industry and Commerce (AIC), a qualified chop-maker (approved by the PSB) must be engaged to produce the company chop.

The Contract chop is used by sales representatives when executing a contract with a client. It grants less authority to its keeper than the company chop and is not a required chop.

The Finance chop is generally used for the company's financial transactions, such as issuing checks, cash withdrawals, wire transfers or the change of account information.

The Fapiao chop is stamped on all invoices issued by the company. It is required as evidence of a business expense for the tax authorities.

The Human Resource Chop is used where the company signs a labor contract with any of its staff. It might also be required on documents such as

²⁰ Maxxelli Consulting, Legalization of documents in China: signing or chopping?, available online at: <http://www.maxxelli-consulting.com/legalization-documents-china-signing-chopping/>, last accessed March 8, 2015.

²¹ *Id.*

employment proof letters for employee registration purposes or internal memos.

The Legal Representative Chop the company's legal representative uses this chop. It has to be registered with the Administration of Industry and Commerce. It is generally used together with the company chop for many official documents, such as tax certificates or the application for the company's business license²².

Despite all those different types of chops, it is possible to find out who has the power to sign your documents. The basic principle is any agreement that doesn't have the company chop is only valid if signed by the legal representative of the Chinese company (the one who's name is stated on the company's business license). A company chop on the other hand is legally binding no matter who signed on behalf of the company. Regarding those rules, it is advisable to have your contract both signed by the legal representative and chopped with the company chop.

In China, a company seal holds the same legal power as the CEO's signature and any unauthorized and inappropriate use of it may cause legal problems for the company. Indeed, someone could, in theory, change the "stock structure" of a Chinese company and transfer its control to a stranger. Over the years, many cases of abuse have been seen where Chinese managers left in charge by their foreign partners took advantage of their physical possession of the chops and took control of the company or changed the conditions of their employment contract by adding new clauses. Those extreme cases are the perfect examples of the crucial importance of establishing an appropriate chop management system.

For all those reasons, having a contract or document officially signed, chopped and recognized as binding in China can be complex and extremely time consuming. The electronic signature seems to be a good alternative as it is a fast and more secure way to make sure that the contract is signed by the right person and in a legally binding method for the signatories of a private or public contract.

²² Maxxelli Consulting, *Id supra*.

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